

UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW HAMPSHIRE

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:
THOMAS JACKSON MILLER, :
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Plaintiffs, : Civil Action No. 1:16-cv-
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-against- : 143-JL
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THE SUNAPEE DIFFERENCE, LLC, d/b/a MOUNT :
SUNAPEE RESORT :
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Defendant. :
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**PLAINTIFF’S MOTION FOR CERTIFICATION PURSUANT TO
NEW HAMPSHIRE SUPREME COURT RULE 34**

1. Plaintiff Thomas Jackson Miller (“Plaintiff”), by and through his attorneys Cullenberg & Tensen, PLLC, respectfully requests certification of questions of law concerning public policy pursuant to New Hampshire Supreme Court Rule 34.

2. “New Hampshire Supreme Court Rule 34 provides that a United States District Court may certify questions of law to the New Hampshire Supreme Court when (a) there is no controlling precedent and (b) answering the questions for certification would determine the outcome of the proceeding.” *Gordon v. Bank of Am., N.A. (In re Grenier)*, 2013 Bankr. LEXIS 352, *9, 2013 BNH 1, 2013 WL 310244.

3. Plaintiff hereby incorporates, as if set forth in full herein, Plaintiff’s Objection to Defendant’s Motion for Judgment on the Pleadings Relative to Plaintiff’s Amended Complaint and all related filings (Doc. No. 38), including but not limited to Doc. No. 46.

4. As explained by the United States District Court for the District of New Hampshire in *Therrien v. Sullivan*:

...when resolution of a novel question of New Hampshire law implicates public policy concerns, [it] is a realm best occupied by the New Hampshire Supreme Court. Because that court has yet to address the discrete issue presented in this case, and because it is unclear how it would likely resolve that issue in the context of the facts as pled, the fairest and most prudent course of action at this stage is to certify the question. Otherwise, the case would be dismissed (perhaps wrongly) and the Court of Appeals would likely have to revisit the question of certification.

2005 U.S. Dist. LEXIS 3935, ** 18-19, 2005 DNH 40.

5. In opposition to Defendant's Motion for Judgment on the Pleadings Relative to Plaintiff's Amended Complaint (Doc. No. 36) and related filings, Plaintiff has raised important and substantial issues of New Hampshire public policy which raises unclear novel issues of New Hampshire law.

6. "[C]ertifying the question in this case is proper not just because the legal issues are not decided by New Hampshire case law but also because they deal with strong state interests." *United States v. Howe*, 736 F.3d 1, 5 (1st Cir. 2013); *Acadia Ins. Co. v. McNeil*, 116 F.3d 599, 605 (1st Cir. 1997) (certifying question to the New Hampshire Supreme Court in part "because the public policy arguments cut both ways").

7. The questions of public policy which Plaintiff requests this Court certify were not injected into this proceeding by Plaintiff, but, instead by Defendant's choice to raise an affirmative defense on which Defendant bears the burden of proof.

8. Accordingly, Plaintiff respectfully requests that this Honorable Court certify questions of law concerning public policy to the New Hampshire Supreme Court.

9. By email dated October 6, 2017, the undersigned conferred with counsel for Defendant in a good faith attempt to obtain concurrence in the relief sought; Defendant has not replied by email; counsel for both parties have tried to reach each other without success by phone. WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Certify questions of law concerning public policy to the New Hampshire Supreme Court; and
- B. Grant such other and further relief as the Court deems necessary.

Dated: October 10, 2017

CULLENBERG & TENSEN, PLLC

s/ Arend R. Tensen

Arend R. Tensen

Attorneys for Plaintiff

199 Heater Road, Suite 2

Lebanon, New Hampshire 03766-1440

Phone: (603) 448-7100

tensen@nhvt-injurylaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon counsel for Defendant via Electronic Service ECF.

CULLENBERG & TENSEN, PLLC

s/ Arend R. Tensen

Arend R. Tensen

Attorneys for Plaintiff

Thomas Jackson Miller

199 Heater Road, Suite 2

Lebanon, New Hampshire 03766-1440

Phone: (603) 448-7100

Fax: (603) 448-9559

tensen@nhvt-injurylaw.com

Dated: October 10, 2017